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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1502

AVNET, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARNOLD M. LERMAN
RONALD J. GREENE
NEAL M. GOLDBERG
Attorneys for Petitioner, Avnet, Inc.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

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FEDERAL TRADE COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Avnet, Inc. ("Avnet") hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on February 28, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 511 F.2d 70 and is set forth in the appendix at pages 1a-18a. The opinion of the Federal Trade Commission ("Commission") is reported at 82 F.T.C. 444 (1973) and is set out in the appendix at pages 19a-84a.

JURISDICTION

The Opinion of the Court of Appeals for the Seventh Circuit was rendered on February 28, 1975. This petition was filed within 90 days of the date of the Court of Appeals decision. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In an adjudicatory proceeding, may agency counsel fail or refuse to notify a respondent that material allegations of the complaint are misleading, and that the case turns upon an essential factual determination in conflict with the complaint and the parties' stipulation of issues?

2. Can a relevant product market be defined solely on the basis of a supposed "functional difference" between two groups of purchasers of identical products used for identical purposes?

STATUTORY PROVISIONS INVOLVED

1. *Clayton Act § 7, 15 U.S.C. § 18*:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

2. *Administrative Procedure Act, 5 U.S.C. § 554*:

> (b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

3. *Federal Trade Commission Rules §§ 3.11 and 3.15*

§ 3.11 *Commencement of proceedings.*—

(a) *Complaint.*—Except as provided in § 3.13, an adjudicative proceeding is commenced by the issuance and service of a complaint by the Commission.

(b) *Form of complaint.*—The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceedings, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable

definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the time and place for hearing, the time to be at least thirty (30) days after service of the complaint.

* * * *

§ 3.15 *Amendments and supplemental pleadings.*—

(a) *Amendments.*—(1) *By leave.*—If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however,* That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

(2) *Conformance to evidence.*—When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve a recurring problem in federal administrative

practice: the scope of the obligation of an agency to provide clear notice of any material changes in the issues being tried in adjudicatory proceedings. The Court should determine whether agency counsel can fail or refuse until the close of trial to notify a respondent of a substantial change in an essential element of their case. The lack of a clear-cut obligation for agency counsel to furnish notice invites, and even rewards, the raising of issues by indirection. It places respondents in agency proceedings in the position of developing defenses based upon guesswork. And it forces appellate courts to speculate about the degree of knowledge they can attribute to such respondents and to comb voluminous records to determine whether lack of knowledge has affected the course of the proceedings. All of these difficulties could be avoided by ruling that the existence of adequate notice of a substantial change in issues will not be inferred from a review of the record as a whole—at least in those circumstances where the change contradicts the allegations of the complaint. Instead, this Court should require a simple, but explicit, acknowledgment on the record before the end of trial indicating that a new issue has been injected into the proceedings.

This simple resolution is suggested with particular force by the circumstances of this case. Here, the Court of Appeals permitted a substantial variance between the issues alleged in the original complaint and the ultimately dispositive issue by concluding that at some point Avnet was aware of the change. Nevertheless, agency counsel presented their entire affirmative case in a manner consistent with the original claims in the complaint. If counsel knew that they desired to pursue a different course, they had an obligation to so state. If they did not know that a change had taken place, it was inappropriate to charge Avnet with such knowledge. In any event, Avnet should not have been forced to guess what

agency counsel really had in mind from, for example, the questions and objections of agency counsel during the presentation of Avnet's witnesses.

The case also presents a serious question concerning the tests to be applied in defining the relevant product market. As a result of the gaps in the record caused by the lack of clear notice, the Commission's definition of the relevant market was found by the Court of Appeals to rest only upon an alleged functional difference between two groups of purchasers—one of which was excluded from the market—even though both purchased the same product and used it for the same purpose. As we show below, this reliance on one factor of such dubious relevance constitutes a serious departure from principles established by this Court. Indeed, a recent ruling of the Ninth Circuit is in direct conflict with the ruling below.

A. Procedural Background

The points at issue arose out of a proceeding before the Federal Trade Commission under Section 7 of the Clayton Act. The Commission had issued a Complaint on April 1, 1969, charging that the 1964 acquisition by Avnet of Guarantee Generator and Armature Co., d/b/a International Products and Manufacturing Co. ("IPM") would lessen competition in the "manufacture and/or supply of parts, materials, and equipment to independent rebuilders [of automotive electrical units.]" (App. 22.)[1] IPM and a division of Avnet, Valley Forge Products, Inc. ("Valley Forge"), had sales in that market.[2]

The case was prepared for trial under an Amended Complaint which alleged that the rebuilding industry "constituted a highly fragmented industry, primarily made up of many small concerns." (App. 45.) The

[1] A certified copy of the Joint Appendix printed for use of the Court of Appeals has been furnished to this Court and references to it in this Petition are in the form "App.".

[2] Avnet had acquired Valley Forge in July, 1964, only six months before its acquisition of IPM.

Amended Complaint alleged that IPM alone—just one of the rebuilder suppliers whose sales were alleged to constitute the relevant market—made sales to "over 5,000 independent distributors and rebuilders." (App. 44.) By the time the Hearing Examiner and the Commission rendered their decisions, the market had been restricted to sales to only 150 to 200 of these more than 5,000 rebuilders. *See* 511 F.2d at 74. These 150 or 200 were allegedly distinguished from other rebuilders by their use of "production-line" techniques. As the Court of Appeals indicated, a review of the record does not disclose when this change first appeared as a possibility during the trial of the case. 511 F.2d at 76.

The Amended Complaint also alleged that, notwithstanding the fragmentation on the demand side of the relevant market, the number of suppliers was quite small. It stated that in 1964 "sixteen firms supplied virtually the total volume of equipment and parts furnished to rebuilders." (App. 45.) As the Court of Appeals found, Avnet developed its case with primary emphasis on proving the falsity of this allegation. In the words of the Court, Avnet attempted "to develop evidence that the 16 firms have so many competitors that their sales do not comprise a relevant market or submarket." 511 F.2d at 73.

The parties' joint Stipulation of Issues [3] filed during the prehearing phase of the proceedings reflects the clear understanding of the parties as to the disputed issues. This stipulation listed fourteen issues and stated that "for the purposes of this proceeding, [the listed subjects] are the contested issues." Each of the fourteen relates in some way to the supply side of the alleged relevant market. None of them related to the identity of the purchasers in the market or suggested that fewer than 5,000 customers were included. Indeed, on the fifth day of the

[3] Commission Exhibit 276, included in the record of proceedings.

hearing, in a colloquy between counsel and the Hearing Examiner, the Examiner confirmed that the definition of "rebuilder," and hence of the identity of the customers in the market, "is not an issue." (App. 569.) Accordingly, the presentation of evidence proceeded throughout the case-in-chief of agency counsel without either party attempting to distinguish in the introduction of sales data between sales to production-line rebuilders (which were ultimately included in the market) and sales to custom rebuilders (which were excluded).[4]

At various points during the presentation of Avnet's defense, the questions and objections of agency counsel seemed to indicate that they were trying to draw some distinction between sales to production-line rebuilders and sales to custom rebuilders. Nevertheless, agency counsel's new definition of the term "rebuilders"—which limited it solely to production-line rebuilders—appeared for the first time in their proposed findings. (App. 125-29.) This appearance of a new definition caused Avnet to argue in its Reply Brief to the Examiner that "a substantial and unauthorized amendment to the Amended Complaint" had been proposed in the findings.[5] Although this argument was renewed before the Commission, it was addressed by neither the Examiner nor the Commission.

Both the Examiner and the Commission concluded that the relevant market consisted only of sales to the 150 or 200 production-line rebuilders, and that IPM and

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[4] *See, e.g.*, App. 594, 601, 616-17, 627-29, 664, 685.

[5] The Reply Brief (App. 218) stated: "With respect to the newly proffered definitions of 'parts/units,' 'rebuilders,' and 'suppliers,' however, Respondent was unable to foresee the ingenuity with which Complaint Counsel would endeavor to tailor a line of commerce precisely to the dimensions of Respondent's business. In their effort to define a market in just such terms, Complaint Counsel continue to disregard the overwhelming weight of the evidence developed in this proceeding and in effect propose a substantial and unauthorized amendment to the Amended Complaint."

Valley Forge had 67 percent of these sales. On appeal before the United States Court of Appeals for the Seventh Circuit, Avnet contended that the Commission's action in permitting this late and contradictory change denied it administrative due process. Avnet also argued that the resulting market definition was improper under the accepted principles governing the delineation of relevant product markets. On the procedural issue, Avnet argued that the Commission denied it an adequate opportunity to prepare its case and to present evidence demonstrating that there was no basis for singling out as a separate market sales to only 150 or 200 of the more than 5,000 rebuilders mentioned in the Complaint. For example, because the Complaint had indicated that all of IPM's 5,000 customers were included within the market, Avnet saw no need to break its customers into categories and prove that the various categories should be treated similarly. Thus, as the Court of Appeals recognized, 511 F.2d at 78, Avnet failed to make a timely or complete offer of proof demonstrating how IPM's sales could be divided between those made to the 150 or 200 of the 5,000 customers who constituted "production-line rebuilders" ultimately included in the market and sales to the rest of its customers who, under the Commission's decision, were excluded from the market as "custom rebuilders." Moreover, Avnet argued that if agency counsel had been proceeding on the theory that the market was limited to purchases by 150 or 200 rebuilders, they could easily have developed and introduced evidence specifically setting forth the amount of those purchases. Avnet contended that the absence of crucial evidence of this sort in the record demonstrated that it had been denied an effective opportunity to prepare and present a defense and that in fact its entire preparation had been directed at a wholly different set of issues.

Although the Court of Appeals conceded that Avnet's reading of the Complaint was "reasonable," it rejected

Avnet's contentions that it had been denied due process by being forced to guess which of complaint counsel's theories it would be required to meet. Instead, the Court concluded that an examination of the record as a whole disclosed a "sharp dispute" concerning the definition of the term "rebuilder." Although the Court found it impossible to identify the point in the proceeding at which Avnet allegedly became aware that the definition in the Complaint was being changed, the Court found (without citing any portion of the record) that Avnet "had sufficient understanding of the issues, and sufficient time" to prepare its defense. 511 F.2d at 77.

B. Factual Background

The evidence received by the Commission provides a general outline of the industry within which the challenged acquisition took place. As the record demonstrates, an owner of a malfunctioning automotive electrical unit [6] can choose among a number of alternatives to obtain a unit which performs satisfactorily. He may (a) purchase a completely new unit, either turning over his old unit "in exchange" or disposing of it in some other way; (b) purchase a rebuilt unit, similarly either exchanging his old unit or disposing of it in some other way; (c) rebuild his old unit or have it rebuilt; or (d) repair his old unit or have it repaired.[7] See App. 760, 893-94.

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[6] The automotive electrical units which are most susceptible to rebuilding are alternators, generators, starters, and voltage regulators. In addition, individual components of these four principal units can be rebuilt. These components include armatures and field coils (parts of starters and generators), starter drives and solenoids (parts of starters), rotors and stators (parts of alternators), as well as bearings, shafts, and other generally used components.

[7] In rebuilding an automotive electrical unit, a rebuilder completely dismantles the used unit and cleans and tests its components. If any of them are defective or excessively worn, he restores them or replaces them with new, rebuilt, reconditioned, or unimpared used

The rebuilding industry exists only because rebuilding of discarded electrical units (called "cores") can usually be accomplished at substantially less cost than the price charged by original equipment manufacturers ("OEMs") —those firms, including the major automobile manufacturers, who produce equipment installed in new vehicles— for comparable new units.[8] The record demonstrates that rebuilding is done by a wide variety of firms. OEMs perform rebuilding themselves and also supervise rebuilding done by "authorized" rebuilders, who produce rebuilt units sold by the OEMs through their own aftermarket distribution outlets. A variety of other companies in the automotive aftermarket rebuild automotive electrical units, including (in addition to firms specializing in rebuilding) warehouse distributors, jobbers, electrical specialty and repair shops, service stations and fleets.[9] The OEMs sometimes authorize these companies to distribute OEM products, either as warehouse distributors or jobbers, and because of this relationship such companies obtain OEM products for rebuilding at a discount.

Different rebuilders have chosen to adopt different production techniques in performing the rebuilding func-

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components. Finally, the unit is reassembled to restore it to working order. The word "repair" as used in this industry describes the removal and replacement only of malfunctioning parts of a unit.

[8] Thus if the OEMs were to produce "sealed" units not susceptible to rebuilding the rebuilding industry would go out of business. Similarly, if the OEMs were to reduce substantially the prices at which they sell new electrical components in the aftermarket, rebuilders would probably find it impossible to compete. (App. 348-49.)

[9] Warehouse distributors ("WDs") are independently owned and operated companies that stock an inventory of products purchased from one or more original equipment manufacturers or other firms for resale to customers including jobbers, dealers, "rebuilders," garages, and service stations. WDs often maintain their own service facilities. Jobbers are usually smaller companies that purchase products from WDs for resale to a wide range of aftermarket customers.

tion. Some employ "production-line" techniques under which each of the various phases of the rebuilding function is performed at different times or by different workers. Others utilize a "custom" rebuilding technique which entails work on one unit at a time with very little division of labor among different workers or machines. Some use a combination of methods. Under any method, the workers take a used "core" and transform it into a rebuilt unit by replacing worn or defective parts with new, rebuilt or used ones.

All rebuilders acquire the same parts, materials and equipment from many different sources, including, in addition to IPM and Valley Forge, firms of many types, such as those who offer either full or narrow lines of products used by rebuilders, those who offer products to the automotive trade generally, and those who sell industrial products to a broad span of users, including rebuilders. The suppliers range in size from the very small to some of the largest industrial firms in the nation, and their sales to rebuilders may be either a small or a large portion of their total sales.

A rebuilder must determine not only whether he will buy the component which he needs in new, rebuilt or used condition, but also what type or types of suppliers he will patronize. The record indicates that the rebuilder makes this decision by weighing factors of price, quality or availability. The rebuilt unit may reach the vehicle owner directly or through a chain of distribution handling rebuilt units. The record demonstrates, in any event, that rebuilders of all types, regardless of size, production techniques or methods of distribution, compete with each other at various levels of the automotive aftermarket, ranging from their purchase of supplies to ultimate competition, either direct or indirect, for the installation of the rebuilt unit on a vehicle.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER AGENCY COUNSEL IN AN ADJUDICATORY PROCEEDING MAY FAIL OR REFUSE TO NOTIFY A RESPONDENT OF A SUBSTANTIAL DEPARTURE FROM THE COMPLAINT

The decision of the Court of Appeals raises a clearly defined, important question of federal law which has not been, but should be, settled by this Court. As we show below, the Court should clarify the confused body of case law which has developed as a result of the continuing failure of agencies to give clear notice to respondents of changes in the theories they are pursuing. It should do so by adopting a simple rule: the existence of adequate notice will not be inferred from a review of the record in the absence of an explicit agency acknowledgment on the record that a new issue has been injected in the proceedings. This rule should be applied at least when the new issue involves a contradiction of a material portion of the complaint.

It is a well settled principle of administrative practice that "the key to pleading and notice in the administrative process is adequate opportunity to prepare." [10] Without adequate notice of all crucial elements of the case against it, a respondent cannot prepare or present its case to the initial finder of facts. *Jaffee & Co.* v. *SEC*, 446 F.2d 387, 394 (2d Cir. 1971). Accordingly, the Administrative Procedure Act in Section 5(b)[11] and the governing rules of most administrative agencies as well (including the FTC),[12] include provisions designed to afford a respondent a reasonable opportunity to prepare

[10] K. Davis, Administrative Law Treatise, § 8.05, p. 530 (1958).

[11] 5 U.S.C. § 554(b).

[12] Rule 3.11, FTC Rules of Practice and Procedure.

a defense, after due notice of the legal and factual issues being raised against it.

In accordance with this basic tenet of administrative law, a number of limitations have developed on the power of an agency to shift theories. One such restriction prevents an agency from introducing a new issue at the review stage after the initial trier of fact has reached a decision based on a different theory. *Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971); *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252 (D.C. Cir. 1968). The Courts have thus held that an agency may not change theories "in midstream without giving respondents reasonable notice of the change." *Id.* 407 F.2d at 1256. Other cases make the point that an agency may only change its theory during the hearing if the respondent has a fair opportunity to respond to the shift, *see, e.g., Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F.2d 499 (D.C. Cir. 1961); *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954). Agency rules, such as Rule 3.11 of the FTC Rules of Practice and Procedure, make this requirement explicit.

Notwithstanding these rules, claims continually arise that an agency has tried to change the issues or theories in its case and that a respondent was not given fair notice and was thereby denied a fair opportunity to present his case.[13] These cases pinpoint the deficiencies which

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[13] The FTC cases alone are illustrative. *See, e.g., L. G. Balfour* v. *FTC*, 442 F.2d 1 (7th Cir. 1971); *Sunshine Art Studios* v. *FTC*, 481 F.2d 1171 (1st Cir. 1973); *Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882, 885-86 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *The Stanley Works* v. *FTC*, 469 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973); *The Kroger Co.* v. *FTC*, 438 F.2d 1372, 1378 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971); *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1970); *Federated Nationwide Wholesalers Service* v. *FTC*, 398 F.2d 253 (2d Cir. 1968); *J. B. Williams Co., Inc.* v. *FTC*, 381 F 2d 884, 887-88 (6th Cir. 1967); *Mohawk Refining Corp.* v. *FTC*, 263 F.2d 818 (3d Cir. 1959). Similar difficulties arise on appeal when a respondent claims that an agency

exist in the manner the basic rules on notice are being applied in the administrative context.

First, the current application of the rules actually encourages agency counsel to avoid specifically delineating the theories upon which they are proceeding. In this case, for example, if agency counsel had acknowledged that they were redefining the market, they would have been required to submit the proposed amendment of the complaint to the Federal Trade Commission—just as they had been required to submit two previous amendments—and run the risk that the amendment would be denied. Moreover, if agency counsel are left free to refuse to commit themselves to specific issues, they can obtain a great litigating advantage by keeping the other side in the dark. These temptations will persist so long as agency counsel can contradict the complaint and later claim that a review of the record indicates that the presentation of evidence or the manner of cross examination constituted the giving of fair notice. The technique of proceeding by indirection—whether or not it was consciously utilized in this case—is wholly inconsistent with the basic principles of openness and candor upon which the integrity of the administrative process rests.

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order is at variance with the complaint upon which the case was allegedly prosecuted. Again, Federal Trade Commission decisions outline the problem. *See, e.g., Continental Wax Co.* v. *FTC*, 330 F.2d 475 (2d Cir. 1964); *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144 (2d Cir. 1964); *Keasbey & Mattison Co.* v. *FTC*, 159 F.2d 940 (5th Cir. 1947); *Armand Co., Inc.* v. *FTC*, 84 F.2d 973 (2d Cir. 1936).

While the cases cited are from the Federal Trade Commission, the problem often arises before other administrative agencies as well. *See, e.g., Montana Power Co.* v. *FPC*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951); *N.L.R.B.* v. *Reliable Newspaper Delivery, Inc.*, 187 F.2d 547 (3d Cir. 1951); *City of Dallas* v. *CAB*, 221 F.2d 501 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 914 (1955); *Southern Louisiana Area Rate Cases* v. *FPC*, 428 F.2d 407, 428-29, n.59 (5th Cir.), *aff'd*, 444 F.2d 125, *cert. denied*, 400 U.S. 950 (1970).

Second, the current application of the notice doctrines places upon a respondent in agency proceedings the full burden of guessing correctly when the possibility of new issues begins to emerge from the manner in which opposing counsel are proceeding. In preparing a defense, it can be of vital importance to know whether an issue is excluded from the Government's case, whether it is specifically included, or whether it is only peripherally involved. No longer is it possible to rely on complaints and stipulations such as those which were presumably to guide the proceedings in this case. Instead, a respondent is forced to shift approaches throughout a case to meet various possible new theories which must be inferred from the questions, demeanor, and implicit emphasis of opposing counsel.

Third, the current approach places upon reviewing courts the obligation to comb voluminous records to determine when the new issues were added to the proceeding, the degree to which the respondent below might have been aware of the addition or substitution, the adequacy of the subsequent opportunity afforded the respondent to be heard, and the relevance of possible defenses which could have been raised if notice had been given. These, of course, are precisely the types of judgments which appellate courts traditionally have attempted to avoid in the administrative arena. Not only do they constitute a waste of scarce judicial resources, they also force appellate courts to become deeply involved in complex questions which they are ill-equipped to resolve because of the difficulty of determining from a cold record the actual trial context in which events took place.

There is a simple solution to this recurring and burdensome problem. If administrative agencies were required to notify the responding party explicitly when they desire to alter any of the critical elements of a case,

then it would be a simple matter for an appellate court to pinpoint the exact time that the change in theory took place, determine the adequacy of the new notice, and ascertain whether, after the notice was given, the opposing parties had a fair opportunity to meet the new theory or issue.[14]

Application of this rule in this case would have made it unnecessary for Avnet to guess at the types of issues agency counsel were raising. The issues thus could have been presented more clearly and completely to the trier of fact, and the strange gaps in the record which even the Court of Appeals noted, 511 F.2d at 78, could have been filled in. Moreover, by providing a precise mechanism for examining the effect of a change of theory, the suggested rule would have provided a clear-cut opportunity for Avnet to demonstrate the necessity of receiving important evidence which the Examiner excluded on a piece-meal basis, without analyzing the cumulative effects of his rulings in connection with the change in theory. At the appellate level, application of the rule would have made it unnecessary for the Court of Appeals to comb the record in a search—albeit unsuccessful—for an indication of the manner in which fair notice of the change in theory was given to Avnet.

Here, the Court of Appeals avoided facing this issue squarely by ruling, in effect, that Avnet could have guessed at the existence of the new definitional issue from an analysis of the Complaint and a dissection of the evidence submitted by agency counsel. Thus, the Court ruled that Avnet might have guessed that agency counsel had discarded the Complaint's allegations con-

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[14] Indeed, this proposed approach has, on occasion, been followed by agency counsel. In *Exquisite Form Brassiere, Inc.* v. *FTC*, *supra*, an amendment to the complaint was sought at the close of the case-in-chief, and the respondent was given a fair opportunity to present evidence on the new issues.

cerning the size of the rebuilding industry because the allegation that virtually all of the sales to rebuilders were made by 16 suppliers was "arguably but by no means necessarily" a hint that a narrower definition was being constructed. 511 F.2d at 76. We submit that the United States Court of Appeals for the Second Circuit disposed of this argument properly in its opinion in *Jaffee & Co.* v. *SEC*, *supra*:

> "[A] primary purpose of the notice requirement in this case is to permit the respondent a reasonable opportunity to prepare a defense against the theory of liability invoked by those who institute the proceedings against it. A respondent may not reasonably be expected to defend against every theory of liability or punishment that might theoretically be extrapolated from the complaint or order if one were to explore every permutation of fact and law there alluded to or asserted. The Commission's proposed test would make a guessing-game of proceedings that the notice and hearing requirement are designed to rationalize." [15]

Although the type of notification suggested here is not ordinarily required in federal civil proceedings, *see* Fed. R. Civ. P. 15(b), the special nature of administrative proceedings requires a stricter rule. Unlike the situation in agency adjudications, the responding party in a civil suit has a full arsenal of discovery procedures available to him in order to help ascertain the charges against him, the theory of his adversary's case, and virtually all of the evidence which is available to the opposing party. Thus, "notice" pleading is adequate in the federal courts, for the parties can become fully informed of the intricacies of their adversary's cases by the time the trial begins. In administrative practice, however, the discovery tools available to a private party—especially those useful in

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[15] 446 F.2d at 394.

defining an adversary's position—are limited. He frequently cannot serve interrogatories or requests for admissions on agency counsel to define the scope of the case against him. Moreover, since a reviewing court in an agency proceeding is severely restricted in the scope of its judicial review authority, there is all the more reason in an administrative context for strict adherence to those procedural rules which allow the parties to face the critical issues squarely and present their respective cases completely and thoroughly. Similarly, since the reviewing court in an administrative context is the sole available judicial check on agencies which combine prosecutorial and quasi-judicial functions, strict adherence to such notice requirements is essential if judicial review is to be meaningful.[16]

Clearly, no explicit notice was given in the instant case. A simple rule requiring notification could have alleviated both the unfairness to Avnet and the eventual burden placed on the Court of Appeals. Certiorari should be granted so that this Court can determine the propriety of requiring such notice, so that these serious problems will not continue to affect the fair and efficient administration of regulatory statutes.

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[16] While a Rule 15(b) motion to amend pleadings may be granted by the trial judge, it is significant that in FTC proceedings, motions for amendments which are not reasonably within the scope of the complaint must be passed upon by the Commission, and not by the Examiner. For this reason, too, an analogy to Rule 15(b) is invalid. *Compare* Rule 15(b) *with* FTC Rule 3.15(a).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING THE PROPRIETY OF DEFINING A RELEVANT PRODUCT MARKET SOLELY ON THE BASIS OF A SUPPOSED FUNCTIONAL DIFFERENCE BETWEEN TWO GROUPS OF PURCHASERS OF IDENTICAL PRODUCTS USED FOR IDENTICAL PURPOSES

A second holding of the Court of Appeals also warrants review by this Court—its holding that a "functional difference" between two categories of customers purchasing precisely the same products for precisely the same ultimate use "provides an adequate prima facie basis for placing [the two categories of customers] in different submarkets." 511 F.2d at 78. This unprecedented holding is, we submit, contrary to accepted principles of market definition enunciated by this Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). Moreover, it is in direct conflict with a recent decision of the Ninth Circuit, *International Tel. & Tel. Co.* v. *General Tel. & Electronics Corp.*, No. 73-1513 (April 25, 1975), BNA-ATRR No. 713 at p. E-1 (May 13, 1975). It is well settled that a relevant product market must be defined in terms of the "practical indicia" of an "economically significant" submarket. 370 U.S. at 325. Agencies and lower courts should not be permitted to focus on a single factor, especially one of such dubious relevance as that chosen by the Court of Appeals, as the sole basis for defining a relevant market.

This highly questionable approach to market definition was, in a sense, a product of the procedural errors discussed in part I of this Petition. As the Court of Appeals noted, the record in this case "does not tell us what portion of the rebuilder suppliers' total sales, or even what portion of IPM's or Valley Forge's total sales, were to custom rebuilders rather than production-line rebuilders." 511 F.2d at 75. Agency counsel themselves

never attempted to show what portion of any supplier's sales were made to one group rather than the other. These and other gaps in the record resulted, we contend, because the parties were not forced to focus on what ultimately became the crucial issue in this case. In any event, the ultimate result of this manner of proceeding can be seen in the technique the Court of Appeals was forced to utilize in resolving the market definition issues: it was forced to base its market definition on a single factor which relates not to the economic realities in the market for sales *to* the two types of rebuilders, but to the manner in which resales *by* the two types of rebuilders can be distinguished.

The Court's ruling was simple. As it put it, "The custom rebuilder is primarily a retailer of services; the production-line rebuilder is a manufacturer of products which are sold largely to jobbers, and presumably to retailers as well." 511 F.2d at 78. This distinction indicated to the Court that the two types of rebuilders "perform significantly different functions and operate at significantly different levels of distribution . . . ." *Id.* Accordingly, the Court concluded that "they" could be placed in separate submarkets.

The point, however, is not whether the rebuilders, as economic entities, can be placed in different submarkets. It may well be that, as sellers of products and services, the two categories of rebuilders could be distinguished sufficiently so that *their* respective sales could be placed in separate submarkets. The question instead is whether sales *to* the two categories of rebuilders are properly segregated into different submarkets. This question does not turn on an analysis of facts which describe the economic context in which rebuilders compete with each other for sales. It turns on facts relating to competition for sales to the rebuilders. Thus, the purported "functional difference" relied upon by the Court of Appeals does not, stand-

ing alone, offer any support for an inference that suppliers of the rebuilders in both categories are not fully in competition with each other.

This was the precise holding of the Ninth Circuit in the *IT&T* case, *supra*. There, IT&T filed suit under the Sherman and Clayton Acts to challenge certain alleged anticompetitive practices by defendant GT&E in the market for the sale of telephone equipment. The District Court defined the relevant market in a way which excluded sales to all purchasers except telephone operating companies. The Court of Appeals found this definition to be erroneous. It held that sales to industrial, governmental, and other common carrier users, as well as certain potential sales to individual telephone subscribers, must also be included in the relevant market. The Court stated:

> The state of competition in the telecommunications equipment-manufacturing industry does not depend on whether the same type of equipment is purchased by a telephone operating company, a microwave common carrier, government or industry. . . . Here the telephone equipment which manufacturers sell to non-operating-company customers is not only interchangeable with equipment sold to operating companies, it is identical. It makes no difference to the manufacturer whether he sells the same piece of equipment to one type of customer or the other. To manufacturers, the only significant difference between operating-company purchases and non-operating-company purchases is that operating companies are likely to purchase in greater volume. But this difference offers no rational basis for excluding non-operating-company purchases altogether in defining the market in which manufacturers compete for sales. *International Tel. & Tel. Co.* v. *General Tel. & Electronics Corp., supra*, at E-8.

This holding is in direct conflict with the ruling of the Seventh Circuit in the present case. Distinctions among

different types of customers of rebuilder-suppliers are just as irrelevant to competition among the suppliers as distinctions among telephone equipment customers were in *IT&T*. In both cases, one identical group of products was being sold to different groups of customers who used the products for identical purposes. In this case, the Seventh Circuit excluded purchases by one group of customers from the market; in *IT&T*, the Ninth Circuit found similar exclusions to be improper.

The few other cases in this area are generally in accord with the decision of the Ninth Circuit. Other courts have held that where one product, used for one purpose, is sold to two groups of customers, sales to both groups of customers should properly be treated as taking place in the same market. *Seeburg Corp.* v. *FTC*, 425 F.2d 124, 127 (6th Cir.), *cert. denied*, 400 U.S. 866 (1970); *United States* v. *International Telephone & Telegraph Co. (Canteen)*, 1971 Trade Cas. ¶ 73,619 (N.D. Ill. 1971); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 563-65 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961). As far as we are aware, until the Court of Appeals' decision in this case, no court had ever permitted a market to be defined solely on the basis of a "functional difference" between two categories of customers. In fact, in those relatively few situations in which sales of similar products to different classes of customers have been placed in separate markets, there have always been other significant factors which provide strong support for drawing a distinction. *See Columbia Broadcasting System, Inc.* v. *FTC*, 414 F.2d 974, 978-79 (7th Cir. 1969); *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962).

Although the Court below hinted that its alleged "functional difference" might similarly be supported by other factors,[17] it ultimately held that a *prima facie* case was

[17] The Court of Appeals did state in a footnote that its conclusion was "buttressed" by evidence indicating that custom rebuilders rely

established by this one point alone. Thereafter, it held, the burden shifted to Avnet, and since there were crucial gaps in the record the Court concluded that the Commission's market was adequately established. Since, however, the burden of proof clearly rested on agency counsel, *United States* v. *E. I. DuPont de Nemours & Co.*, 353 U.S. 586, 593 (1957), the Court could not rest its decision on the alleged functional difference unless that difference were sufficient to define the market.

This Court's decision in *Brown Shoe, supra*, clearly indicated that agencies and lower courts were to engage in a detailed analysis of the relevant economic facts concerning the precise market whose boundaries are being

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primarily upon OEM wholesale distributors as their sources of supply. 511 F.2d at 78, n.22. This point was, however, mentioned only as support for the conclusion that there was a "functional" distinction between the two categories of rebuilders. It was not offered, and could not have been offered, as evidence that there was not effective competition among the various types of suppliers to the two categories of rebuilders. On this broader point, the Court clearly concluded that the record lacked adequate evidence. 511 F.2d at 74-75. In any event, the Court's discussion of an alleged price differential between two groups of *suppliers*—the wholesale distributors on the one hand and other rebuilder suppliers on the other—is irrelevant to the question before this Court. The market was not defined to exclude any category of suppliers. It was defined in a way which excluded all sales to one group of customers. It is in fact undisputed that, whatever price differentials there may be among suppliers, no supplier distinguishes in price between customers depending solely on whether the customer uses production-line of custom rebuilding techniques.

The opinion similarly cites a memorandum from an Avnet officer as "corroboration" of its conclusion that "competition for the patronage of the production-line rebuilders was of paramount importance to the rebuilder suppliers . . . ." 511 F.2d at 78-79. This memorandum, by itself, can hardly be justification for creating two separate submarkets, and the Court of Appeals does not so treat it. The decision clearly relies on the alleged functional distinction as the sole basis for its conclusion that complaint counsel had put on "an adequate prima facie case."

defined. The recent Ninth Circuit decision in *IT&T* follows this approach. Certiorari should be granted in this case to resolve the conflict between the Seventh and Ninth Circuits and to determine whether the rule as set forth in *Brown Shoe* can be undermined by allowing agencies to define a relevant market solely in terms of the identity of the customers, even though the same product used for the same purposes is sold to customers who are excluded from the market.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

ARNOLD M. LERMAN
RONALD J. GREENE
NEAL M. GOLDBERG

Attorneys for Petitioner, Avnet, Inc.

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

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